

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID L. KISER and TENNESSE VALLEY AUTHORITY,
PHOSPHATE DEVELOPMENT WORKS, Wilson Dam, AL

*Docket No. 03-613; Submitted on the Record;
Issued August 21, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained noise-induced hearing loss causally related to factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a further review of his case on the merits under 5 U.S.C. § 8128(a).

On February 11, 2002 appellant, then a 74-year-old steamfitter, filed a notice of occupational disease and claim for compensation, alleging that he sustained hearing loss as a result of exposure to hazardous noise in the performance of duty in his federal employment. In a February 11, 2002 statement, appellant indicated that he worked construction at the employing establishment from March 1952 to 1970. He stated that he worked as a pipefitter on construction at the facility and was placed in areas that were rejected by coworkers. Appellant indicated that his duties exposed him to loud noises from drilling of limestone, to maintaining the air, water and dewatering pumps and to the dynamite blasting in the intake tunnels and discharge water. He also noted that he serviced boilermakers and was exposed to iron workers and riveting. He stated that he was not given earplugs.¹ Appellant also noted that in 1954 he worked in a chemical plant and, while working there, an explosion occurred within 20 feet of him causing him to have ringing in his ears for days. He also noted that he was at a different plant in the 60's and he was exposed to excessive hammering, welding and grinding. Accompanying his claim, appellant enclosed a position description, physical examinations and copies of audiograms dated March 5, 1968, April 12 and November 11, 1972 and July 29, 1982, and a position description.

The employing establishment controverted appellant's claim indicating that appellant only worked for them nine years out of his fifty-seven-year employment history and indicated that earplugs had been provided since 1973.

¹ In a separate form, appellant indicated that earplugs were not available during his employment and they were not offered until the 1970's.

By letter dated March 19, 2002, the Office requested additional information.

By letter dated April 8, 2002,² appellant provided the additional information.

On May 17, 2002 the Office medical adviser reviewed appellant's audiograms and opined that there was no significant threshold shift (or progression of preexisting hearing loss) during this interval. The Office medical adviser explained that the initial employment audiogram of March 5, 1968 showed bilateral to moderately severe hearing loss and subsequent studies through July 29, 1982 did not show any significant threshold shift.

The Office referred appellant along with a statement of accepted facts to Dr. George Godwin, a Board-certified otolaryngologist, for a complete audiologic and otologic evaluation and review of medical records. In conjunction with that evaluation, an audiogram was obtained on June 24, 2002. The losses at the frequencies of 500, 1,000, 2,000 and 3,000 cycles per second were recorded for the right ear as 35, 40, 45 and 60 decibels respectively and for the left ear as 40, 40, 50 and 65 decibels respectively.

In his June 24, 2002 report, Dr. Godwin noted that appellant had hearing loss prior to his employment. He stated that, prior to appellant's federal employment, he had bilateral sensorineural hearing loss in 1968. Dr. Godwin noted that appellant's loss in 1982 when he retired was consistent with presbycusis and it was not due to federal noise exposure. His diagnosis was bilateral sensorineural hearing loss and he opined that it was not due to appellant's federal employment.

The record reflects that the Office issued two decisions on July 16, 2002. In one decision dated July 16, 2002, the Office accepted appellant's claim for bilateral hearing loss. In the other decision dated July 16, 2002, the Office also denied appellant's claim as the medical evidence was insufficient to establish an injury in the performance of duty.

By letter dated August 5, 2002, the Office advised appellant that they had inadvertently sent him two different decisions on the same date. The Office advised appellant that the denial stood and if he disagreed with the decision, he should follow his appeal rights.

By letter dated August 11, 2002, appellant requested reconsideration. In support of his request, he repeated that he was exposed to loud noises during his federal employment and suffered employment-related hearing loss. He also provided a statement from Charles R. Boyd, a business manager from local union #760.

In an August 14, 2002 statement, Mr. Boyd indicated that appellant has been a member of the plumbers and pipefitters local union #760 since 1946. He stated that appellant was exposed to all types of loud noises during his working career including grinders on pipe vessels and tanks, sledgehammers hitting metal, jackhammers, air compressors, pumps and all types of heavy industrial motors and equipment. He added that anyone working in construction was exposed to loud noises and hearing protection was not recommended until recently.

² The letter is actually dated April 8, 2000, however, this appears to be a typographical error.

By decision dated October 7, 2002, the Office denied merit review of appellant's request for reconsideration on the grounds that appellant did not submit any substantive legal questions and the evidence submitted was not new or relevant.

The Board finds that appellant failed to establish that he has a noise-induced hearing loss causally related to factors of his federal employment.

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States within the meaning of the Act, that the claim was filed within the applicable time limitation of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury."³ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.⁴

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁵ The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.⁶ Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based upon a complete factual and medical background of the claimant,⁷ must be one of reasonable medical certainty⁸ and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.

³ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

⁵ *See Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁶ The Board has held that, in certain cases, where the causal connection is so obvious, expert medical testimony may be dispensed; *see Naomi A. Lilly*, 10 ECAB 560, 572-73 (1959). The instant case, however, is not a case of obvious causal connection.

⁷ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

⁸ *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

In the present case, it is undisputed that appellant was exposed to employment-related noise. However, the Office found that the medical evidence was insufficient to establish an injury resulting from the event.

The Office sent appellant for an evaluation with Dr. Godwin, who had a full and accurate history of his work-related noise exposure based on the statement of facts, a copy of appellant's prior audiograms and the results of the June 24, 2002 audiogram. Dr. Godwin indicated that, although appellant did have evidence of a bilateral moderate high frequency neurosensory hearing loss, however, he had prefederal employment hearing loss noted in 1968 and his loss was related to presbycusis and was not due to his federal noise exposure and he was unable to attribute any of the hearing loss to the federal employment.

Appellant did not provide any evidence that indicated his federal noise exposure was the cause of any of his hearing loss. Thus, in the absence of a rationalized opinion establishing a causal relationship between appellant's diagnosed hearing loss and factors of his employment, the Office properly denied compensation.⁹

The Board further finds that the Office properly denied merit review of appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may--

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

Under 20 C.F.R. § 10.606(b)(2) (1999), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) (1999) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2) (1999), or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁰

⁹ The Board notes that the Office inadvertently sent out two decisions on the same date, both an acceptance and a denial. The Office subsequently advised appellant that an error had been made and the denial stood. The Board does not consider this to be a rescission under 20 C.F.R. § 10.610 (1999) as it appears to have been an administrative error.

¹⁰ 20 C.F.R. § 10.608(b) (1999).

In the present case, relevant and pertinent new medical evidence did not accompany appellant's requests for reconsideration. This is important since the underlying issue in the claim, whether appellant has a work-related disability, is essentially medical in nature.

In its October 17, 2002 decision, the Office correctly noted that appellant did not submit relevant and pertinent new evidence not previously considered by the Office. Appellant, in his reconsideration request, repeated that he had been exposed to all types of noises. The Office has accepted that appellant was exposed to noises during his federal employment. His statement is not sufficient as it is repetitive.¹¹ The subsequent statement provided by Mr. Boyd, a union official, was irrelevant as he was not a physician. He referred to the types of noise exposure that were involved in appellant's employment. This information is already in the record.¹² The information provided in this report was not new, relevant or pertinent. He did not advance a relevant legal argument that had not been previously considered by the Office. Additionally, appellant did not argue that the Office erroneously applied or interpreted a specific point of law. Consequently, appellant is not entitled to a merit review of the merits of the claim based upon any of the above-noted requirements under section 10.606(b)(2) (1999). Accordingly, the Board finds that the Office properly denied appellant's August 11, 2002 request for reconsideration.

Accordingly, the October 7 and July 16, 2002¹³ decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
August 21, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ See *Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).

¹² *Id.*

¹³ The decision denying appellant's claim.